LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 401

PVT. E2 DENNIS MORA,
PFC. E3 JAMES A. JOHNSON, and
PVT. E2 DAVID A. SAMAS,
Petitioners,

v.

ROBERT S. McNAMARA, as Secretary of Defense and
STANLEY RESOR, as Secretary of the Army
of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANLEY FAULKNER
9 East 40th Street
New York, N. Y. 10016

SELMA W. SAMOLS
517 11th Street, N. W.
Washington, D. C. 20004

Attorneys for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Treaties Involved 3

Statutes Involved 4

Statement of the Case 7

Reasons for Granting the Writ 8

1. International treaties have the force of law and United States war action in Vietnam is in violation thereof 12

2. The military conduct of the United States in Vietnam without a declaration of war by Congress violates Article 1, Section 8, Clause 11 of the Constitution 15

3. It is the duty of the respondents to take care that the laws be faithfully executed 16

4. The seizure and deployment of petitioners to Vietnam would violate their right of legal due process under the Fifth Amendment 17

5. United States action in Vietnam violates the laws of land warfare and petitioner's participation would make him guilty under International Law 19

6. Treatment of prisoners 19

Conclusion 22

Certificate of Service 23

Appendix A – Opinion of the District Court for the District of Columbia 24

Appendix B – Per Curiam Judgment of the United States Court of Appeals for the District of Columbia Circuit 25

Appendix C – Opinion of United States Circuit Court of Appeals in Luftig v. McNamara, et al. 26

Appendix D – Order Extending Time to File Petition for Writ of Certiorari 28

Appendix E – Treaties 29

TABLE OF CASES CITED

Baker v. Carr, 369 U.S. 186 ..... 9, 10

Clark v. Allen, 331 U.S. 503-508 12

Ex Parte Milligan, 4 Wall. 2 15

Hines v. Davidowitz, 312 U.S. 52 12

In re Yamishita, 327 U.S. 1 (1946) 21

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1948) 10

Luftig v. McNamara, et al., 373 F.2d 664 8

Missouri v. Holland, 252 U.S. 416 12

Nixon v. Herndon, 273 U.S. 536 9

Philadelphia v. Stimson, 223 U.S. 605 17

San Lorenzo Title and Improvement Co. v. Caples, 48 S.W.2d 329 12

The Belsen Trial (Trial of Kramer, et al.) 21

The Dachau Concentration Camp Trial (Trial of Weiss, et al.) (1945) U. S. Gen. Mil. Govmt. Ct., L. R. T. W. C., XI, 12-16 19

The Frances Louise, 1 F.2d 1004, app. dis. in U. S. v. Beckman, 270 U.S. 666 12

The Habana, 175 U.S. 677 12

The Jaluit Atol Case (Trial of Aeuberger) (1946) Br. Mil. Ct. Germany, ibid., 81 21

The Sophia Rickmers, 45 F.2d 413 13

Trial of Yoshio Makizawa (1946) U. S. Mil. Commission, Shanghai, L. R. T. W. C. XV, 101 20

United States v. Cohen Grocery Co., 255 U.S. 81 18

United States v. Lee, 106 U.S. 196 10

United States v. Pink, 315 U.S. 203 12

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 ..... 9, 11, 16, 17, 18

STATUTES CITED

Title 28, United States Code, Section 1254 (1) 2

Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88th Congress, 2d Session 4

Constitution of the United States

Article I, Section 8, Clause 11 ..... 3, 8, 16
Article II, Section 3 ..... 3, 8, 16
Article III, Section 2, Clause 1 4
Article VI, Clause 2 ..... 4, 12
Fifth Amendment 4

OTHER AUTHORITIES CITED

Department of the Army Field Manual, FM 27-10, July, 1956

Chapter 1, Section 1, Paragraph 2 ..... 5, 19
Chapter 1, Section 1, Paragraph 7b 5
Chapter 1, Section 1, Paragraph 9 5
Chapter 8, Section II, Paragraph 498 6
Chapter 8, Section IV, Paragraph 509(a) 6
Chapter 8, Section IV, Paragraph 511 6

Mr. Justice Douglas, The Great Rights, pages 134-137 ..... 10, 12

134 A.L.R. 883 12

67 Corpus Juris, 336, 347 and note 16 14

Black's Law Dictionary, 2d ed., page 1217 14

J. G. Starke, An Introduction to International Law, page 61 16

Professor Greenspan, The Modern Law of Land Warfare 19

TREATIES

The Kellogg-Briand Pact (Pact of Paris) 46 Stat. 2343 . . . . 7, 13, 29

The Charter of the United Nations, 59 Stat. 1031

Chapter 1, Article 2(4) 29
Article 6(a) . . . . .
Chapter VII, Article 39 29
Chapter VIII, Article 53 14

The Nuremberg Judgment 7, 13, 29

The Geneva Agreement of 1954 . . . . . 7, 13

The Southeast Asia Collective Defense Treaty (SEATO)
Article 4 . . . . . 7, 14

Geneva Convention on Prisoners (1949)

Article 12 33
Article 13 21
Article 17 20,24

Hague Convention No. 111 (October 18, 1907)
36 Stat. 2259 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

PVT. E2 DENNIS MORA,
PFC. E3 JAMES A. JOHNSON, and
PVT. E2 DAVID A. SAMAS,

Petitioners,

v.

ROBERT S. McNAMARA, as Secretary of Defense and
STANLEY RESOR, as Secretary of the Army
of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1967, affirming the order of the District Court dismissing the action for injunctive relief and a declaratory judgment.

THE OPINIONS BELOW

The opinion of the District Court Judge is printed in Appendix A hereto, p. 24. The Circuit Court of Appeals did not render a separate opinion in this case, but on stipulation of attorneys for petitioners and respondents made the court's decision in the case of *Luftig v. McNamara and Resor*, reported in 373 F.2d 664, applicable hereto. The per curiam judgment of the court is printed in Appendix B hereto, p. 25 and is unreported. The opinion of the Circuit Court of Appeals in *Luftig v. McNamara and Resor* is printed in Appendix C hereto, p. 26.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1967, Appendix B.

The order of this Court extending petitioners' time to file this Petition was made July 20, 1967, and is printed in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the orders to petitioners dated June 8, 1966, to go to Vietnam are legal.

2. Whether the United States is engaged in a war in Vietnam in violation of the following treaty obligations and assurances:

(a) Kellogg-Briand Pact (Pact of Paris)

(b) Charter of the United Nations

(c) Nuremberg Judgment

(d) Geneva Agreement of 1954

(e) Southeast Asia Collective Defense Treaty (SEATO)

3. Whether the military conduct of the United States in Vietnam is a war in violation of Article I, Section 8, Clause 11 of the Constitution.

4. Whether the President by his agents, the respondents, is violating Article II, Section 3 of the Constitution of the United States by failing to faithfully execute the law of treaty obligations.

5. Whether the seizure and deployment of petitioners to Vietnam would violate their right of legal due process under the Fifth Amendment and whether the judiciary has the power to stay the Executive Branch of the Government from committing illegal acts which would subject petitioners to personal injury.

6. Whether the petitioners are subject to and bound by the following provisions of Department of the Army Field Manual, FM 27-10 (July 1956) (Chapter 8):

(a) Crimes under International Law, namely crimes against peace, crimes against humanity and war crimes (Section II, par. 498).

(b) Individual responsibility, even though he acted pursuant to an order of a superior authority a soldier has no defense to the violation of a war crime (Section IV, par. 509a).

7. Whether the United States in Vietnam is violating the Geneva Convention of 1949 to which respondents would subject petitioners.

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

A. CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 11

The Congress shall have Power * * *: To declare war * * *.

Article II, Section 3

* * * he [President] shall take Care that the laws be faithfully executed * * *.

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * *.

Article VI, Clause 2

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

B. TREATIES

(a) The Kellogg-Briand Pact

(b) The Charter of the United Nations

(c) The Nuremberg Judgment

(d) The Geneva Convention of 1949

(e) The Geneva Agreement of 1954

(f) The Southeast Asia Collective Defense Treaty.

Since the provisions of the treaties are lengthy, their pertinent texts are set forth in the Appendix E, p. 29.

STATUTES INVOLVED

1. Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88 Congress, 2d Session (all steps taken by the President in Southeast Asia shall be):

Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, there-

fore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member of protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

2. *The Law of Land Warfare*, Department of the Army Field Manual, FM 27-10, July 1956.

(a) *Chapter 1, Section 1, Paragraph 2:*

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

(a) Protecting both combatants and non-combatants from unnecessary suffering;

(b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and

(c) Facilitating the restoration of peace.

(b) *Chapter 1, Section 1, Paragraph 7b:*

Force of Treaties Under the Constitution. Under the Constitution of the United States, treaties constitute part of the 'supreme Law of the Land' (Art. VI, Cl. 2). In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.

(c) *Chapter 1, Section 1, Paragraph 9:*

Applicability of Law of Land Warfare in Absence of a Declaration of War. As the customary law of war applies to cases of international armed conflict and to the forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law. Similarly, trea-

ties relating to "war" may become operative notwithstanding the absence of a formal declaration of war.

(d) *Chapter 8, Section II, Paragraph 498:*

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes Against peace.

b. Crimes against humanity.

c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes."

(e) *Chapter 8, Section IV, Paragraph 509(a):*

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(f) *Chapter 8, Section IV, Paragraph 511:*

The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

STATEMENT OF THE CASE

Petitioners Mora and Johnson were drafted into the United States Army on December 6, 1965; Samas was drafted on December 2, 1965.

On June 8, 1966, petitioners, then stationed at Fort Hood, Texas, received orders to report on July 12, 1966, to United States Army Overseas Replacement Station, Oakland, California, for deployment to Vietnam.

On June 30, 1966, petitioners held a press conference in New York in which they said they would not go to Vietnam.[1] That same day they brought this action for an injunction to restrain Robert S. McNamara, as Secretary of Defense, and Stanley Resor, as Secretary of the Army, from shipping them to Vietnam and for a declaratory judgment that they not be made to commit illegal acts.

The complaint alleged that the war being waged by the United States in Vietnam violates the following laws and treaties entered into by the United States and the Constitution of the United States:

(a) Kellogg-Briand Pact.

(b) Charter of the United Nations.

(c) Nuremberg Judgment.

(d) Geneva Agreement of 1954.[2]

(e) Southeast Asia Collective Defense Treaty of 1954.

---

[1] "We were all of the same opinion that should we receive orders to go to Vietnam we would definitely take a stand and refuse to go. Our reasons were that the war was illegal and immoral. I feel this is a war of aggression because the United States has committed troups to Vietnam without having a declaration of war. It has bombed a country which we are not at war with. We could not bring ourselves to do something contrary to our beliefs and involve ourselves in something which we would consider criminal".

[2] To which United States gave assurance it would abide by its terms. Appendix E, hereto.

(f) Article I, Section B, Clause 11 of the Constitution of the United States.

(g) Article II, Section 3 of the Constitution of the United States.

The complaint further alleged that the deployment of petitioners to Vietnam would deny them due process of law under the Fifth Amendment to the Constitution of the United States.

On a motion for a preliminary injunction the complaint was dismissed *sua sponte*.

REASONS FOR GRANTING THE WRIT

In sustaining the judgment below, the Court of Appeals in a *per curiam* judgment erred in failing to distinguish an important factual situation between this case and that of *Luftig v. McNamara, et al., supra,* namely that Luftig had not received orders to go to Vietnam whereas these petitioners had received such orders and their legal rights were being immediately affected.[3] The affirmance was predicated upon two propositions of law:

1. That the relief sought represented a claim for judicial review of political questions beyond its jurisdiction.

2. That it was an unconsented suit against the United States.

---

[3]Seven days after the commencement of this action for an injunction their orders to go to Oakland, California, for deployment to Vietnam were modified and they were arrested with no charges filed against them. Two days after the District Court dismissed the complaint they were given orders to board transportation to go to Vietnam, which they refused as they previously said they would. On September 6, 7, 8 and 9, 1966, they were court-martialed and sentenced to confinement for three years (Mora) and five years (Johnson and Samas). On appeal to Military Review Board the sentences of Johnson and Samas were reduced to three years.

The opinion of affirmance held that the division of authority established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; that these are matters within the exclusive province of Congress and the Executive.

The opinion cited cases which are easily distinguishable but failed, as the lower court did, to mention *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579; *Baker v. Carr*, 369 U.S. 186, and *Nixon v. Herndon*, 273 U.S. 536, which are in point and were cited extensively in all courts by petitioners.

In *Nixon v. Herndon*, *supra*, p. 540, this Court struck down the defense of "political question" where recovery was sought for private damage, saying:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since (cases cited) and has been recognized by this court (cases cited).

Likewise in *Baker v. Carr*, *supra*, p. 209, this Court held that a defense of "foreign policy question" does not deprive the court of jurisdiction.

> Of course the mere fact that the suit seeks protection of political right does not mean it presents a political question. Such an objection "is little more than a play upon words." (citing *Nixon v. Herndon*, *supra*.)

and at page 211, this Court further held:

> Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its man-

> agement by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action" * * * must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer.

"Recognition of belligereney abroad is an executive responsibility" this Court nevertheless further held in *Baker v. Carr, supra*, p. 212:

> * * * if the executive proclamations fall short of an explicit answer a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative.

With the increase of the Federal power both nationally and internationally more and more situations come within the orbit of the loose definition of a "political" question. Concomitantly the courts have extended the Constitution to guard the individual and preserve his constitutionally protected rights. In 1960 Mr. Justice Douglas said in the James Madison Lecture at New York University, "But the 'political' question should no longer be used as a thicket behind which the judiciary retreats."[4]

Injunctive relief is proper against an officer of the sovereign when his acts are constitutionally void and would deprive anyone of life, liberty or property wihout due process of law. (*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948), citing *United States v. Lee*, 106 U.S. 196.)

The lower courts erred in immunizing respondents on the ground that they are acting for the President. This Court has

---

[4] *The Great Rights*, pp. 136, 137, edited by Edmund Cahn, The Macmillan Company, New York.

has held that such immunity is non-existent when irreparable injury will be suffered unless injunctive relief is granted. In *Youngstown Sheet and Tube Co. v. Sawyer, supra*, this Court came to grips with this question and resolved it against the President and his agent, Secretary of Commerce Sawyer:

> The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives content to undefined provisions in the frame of our government.
>
> It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he asked to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay on behalf of the Court, wrote thus to the Father of his Country:
>
> We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights of peace, and dignity of the United States.
>
> In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.

That private rights may derive from treaties and the power of the Courts to adjudicate the decisions of the President was stated by Mr. Justice Douglas in his James Madison Lecture at New York University in 1960 (pp. 134, 135):[5]

> Another group concern functions specifically assigned by the Constitution to a particular department. Treaty-making authority is one example. The power to conduct foreign affairs, including the decision to recognize or not to recognize a particular regime, is another.
>
> Yet even though power is given exclusively to one department to do a certain act, when the power is exercised, justiciable rights may arise. Private rights commonly derive from treaties. The Chief Executive, as Commander-in-Chief, makes decisions in which no one else can participate. But what he does often give rise to claims that courts should adjudicate.

1. International Treaties Have the Force of Law and United States War Action in Vietnam Is in Violation Thereof.

Article VI, Clause 2 of the Constitution in clear unequivocal language provides that Treaties are the Supreme law of the land and all judges are bound thereby. (*The Habana*, 175 U.S. 677, 700; *Missouri v. Holland*, 252 U.S. 416; *Hines v. Davidowitz*, 312 U.S. 52, 62-63; *United States v. Pink*, 315 U.S. 203, 230-231; *Clark v. Allen*, 331 U.S. 503-508.)

There is a duty that the Courts take judicial notice of treaties and apply their provisions to private rights. (*San Lorenzo Title and Improvement Co. v. Caples*, 48 S.W.2d 329, 331; 134 A.L.R. 883.)

The construction and application of treaties wherever necessary are as any other laws, to be considered and determined by the courts. (*The Frances Louise*, 1 F.2d 1004, app. dis. in *United States v. Beckman*, 270 U.S. 666.)

---

[5] See note 4.

While great weight will be given to the construction of a treaty by the Executive Department if and when made, the question itself is judicial in its nature. (*The Sophie Rickmers*, 45 F.2d 413.)

The United States has entered into many treaties outlawing wars:

(a) *The Kellogg-Briand Pact* (Pact of Paris)[6] 46 Stat. 2343. The provisions renouncing wars are set forth in pendix E hereto.

(b) *The Charter of the United Nations*, 59 Stat. 1031, is recognized as a treaty under international law.[7] The pertinent provisions are set forth in Appendix E hereto. Unilateral action by any member without the sanction of the United Nations has been condemned.[8]

(c) *Nuremberg Judgment*. A Resolution adopting the principles of the Judgment was passed at the Fifty-fifth plenary meeting of the General Assembly of the United Nations on December 11, 1946. The Resolution is set forth in full in Appendix E, hereto. When the United States violated the assurance it gave to abide by the conditions of the Geneva Agreement of 1954 it violated Article 6(a) of the Nuremberg Judgment.[9]

---

[6] "Being permanent in its nature and purpose and representing a fundamental change in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the corner-stones of the international legal systems." L. Oppenheim and H. Lauterpacht, p. 197.

[7] Ambassador Arthur J. Goldberg, former Associate Justice of the Supreme Court of the United States, quoted in an article in *The New York Times*, February 6, 1966: "Sometimes, just because the United Nations is such a great concept, we forget that the Charter is also a legal document, a treaty, and we're bound by it—we have treaty obligations.

[8] The Sinai Peninsula incident in 1956.

[9] See assurance given by United States with respect to Geneva Agreement of 1954 in Appendix E, hereto.

The same principles of the Nuremberg Judgment governing crimes under international law were adopted by the Department of the Army on July 13, 1956, and contained in its Field Manual FM 27-10, paragraph 498.[10]

(d) *The Geneva Agreement of 1954* recognized Vietnam as a single state[11] and therefore the armed conflict that thereafter started was a civil war.[12] (67 Corpus Juris 336, 337 and note 16; Black's Law Dictionary, 2d ed., p. 1217.)

When the United States took over the fighting in Vietnam it violated Article 2(4) of the Charter of the United Nations. (Appendix E, hereto.)

(e) *The Southeast Asia Collective Defense Treaty (SEATO)*[13] offers no legal support to the United States for its engagement in the war in Vietnam. The members of SEATO would not vote for such action or to support the United States in its war in that area. Even if SEATO had so voted prior approval by the Security Council of the United Nations would have been necessary under Chapter VIII, Article 53, set forth in Appendix C, hereto.

Nor can the unilateral action by the United States in Vietnam be legally justified under this Treaty since Article 4 thereof states that members may "act to meet the common danger in accordance with its constitutional processes." There is no constitutional process that can be offered as a justification for the acts of war being committed daily in Vietnam.

---

[10] *Supra*, p.

[11] Appendix E, hereto.

[12] *A Modern Law of Nations*, pp. 165-166, Prof. Philip C. Jessup; 57 *American Society of International Law Proceedings*, p. 152, by Prof. Louis Henkin; *Moore's Digest of International Law*, Vol. 2, p. 412.

[13] Created September 8, 1954, nineteen days after the Geneva Agreement, by Australia, France, New Zealand, Pakistan, Philippines, Thailand, United Kingdom and United States.

2. The Military Conduct of the United States in Vietnam Without a Declaration of War by Congress Violates Article 1, Section 8, Clause 11 of the Constitution.

Without any declaration of war by Congress the United States is engaged in an extensive war campaign in Vietnam.

(a) United States troop commitments in Vietnam number about 450,000.

(b) United States casualties in Vietnam were reported on June 17, 1967, as 11,099 killed, 1,966 non-combatant deaths, 67,083 wounded and 559 missing.[14]

(c) The United States has established military bases in South Vietnam, Thailand and Guam.

(d) All four branches of our military are involved in Vietname, the Army, Navy, Marine Corps and Air Force.

(e) United States forces have been engaged in actual combat in Vietnam since January 1, 1961.

(f) The United States has conducted air strikes and ground fighting and the use of chemical warfare against military personnel, installations and the civilian population.

(g) The United States is in joint, if not sole, command of the military forces in South Vietnam.

(h) A "Cold War G.I. Bill of Rights" for those who have served in the armed forces after January 31, 1955, has been passed by Congress into law.

(i) The appropriation for the 1967-1968 war budget in Vietnam is now $20 billion dollars.

This is a war being conducted by the President and his subordinates, the defendants herein, without a declaration of war by Congress. (*Ex Parte Milligan*, 4 Wall. 2.)

---

[14] When the Brief to the U. S. Court of Appeals for the District of Columbia was filed in *Luftig*, these casualties as of March 3, 1966 were 3,662 killed, 640 non-combatant deaths, 20,244 wounded and 275 missing.

The war by the United States in Vietnam violates international law. (*An Introduction to International Law*, p. 61, J. G. Starke.)

The Constitution vests in Congress alone the power "to declare war," Article I, Section 8, Clause 11. But a declaration by the President of an emergency and his assumption of powers as wartime Commander-in-Chief of the Army and Navy, is the equivalent of a declaration by the President of a state of war. The actions taken under such conditions are justiciable.[15]

3. It is the Duty of the Respondents To Take Care That the Laws Be Faithfully Executed.

Article II, Section 3 of the Constitution imposes the duty upon the President of the United States to see that laws are faithfully executed. This does not mean some laws or only those selected, but all the laws of the land. Under Article VI, Clause 2, these include treaties made with other nations, including the Charter of the United Nations.

By the language of this Constitutional duty of the President, the subordinates to whom such "care" is entrusted bear the same responsibility and in this instance, the respondents.

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised

---

[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579;
Little v. Barreme, 2 Cranch 170;
Ex Parte Milligan, 4 Wall. 2;
Mitchell v. Harmony, 13 How. 115;
Duncan v. Kahanamoka, 327 U.S. 304;
Sterling v. Constantin, 287 U.S. 378;
The Orano (CC), 1 Gall 137, F. Cas. No. 10585.
Galston v. Hoyt, 3 Wheat 246;
Filbin Corp. v. United States (D.C. S.C.), 266 F. 911;
Ex Parte Merryman (CC), Taney 246, F. Cas. No. 9487.

by him through the head of the appropriate department, whose acts become the President's acts.[16]

This action for injunctive relief to prevent the seizure and deployment of petitioners to engage in an illegal act (the war) is not an action against the United States, but a challenge to respondents' authority and the abuse of their powers. (*Philadelphia v. Stimson*, 223 U.S. 605, 620.)

4. The Seizure and Deployment of Petitioners to Vietnam Would Violate Their Right of Legal Due Process Under the Fifth Amendment.

The petitioners' personal rights should be equal to if not greater than property rights. The respondents cannot seize and enlist petitioners to engage in an illegal war any more than they can seize private property without lawful authority.

The legal right of petitioners to the injunctive relief sought herein is supported by *Youngstown Sheet and Tube Co. v. Sawyer, supra.* In this case the Court struck down the power of the President to seize steel plants under an executive order. This Executive Order was made in the face of a possible steel strike during the Korean conflict and on the mistaken legal assumption that the President had this power as the Nation's Chief Executive and the Commander-in-Chief of the Armed Forces of the United States.

In *Youngstown, supra,* this Court held that the seizure order could not be sustained "* * * as an exercise of the President's military power as Commander in Chief of the Armed

---

[16] Wilcox v. McConnell, 13 Pet. 498, 513 (1839);
United States v. Eliason, 16 Pet. 291 (1842);
Williams v. United States, 1 How. 290, 297 (1843);
United States v. Jones, 18 How. 92, 95 (1865);
The Confiscation Cases, 20 Wall. 92 (1874);
United States v. Farden, 99 U.S. 10 (1879);
Wolsey v. Chapman, 101 U.S. 755 (1880);
In re Neagle, 135 U.S. 1 (1890).

Forces * * * Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power power to the President."

Mr. Justice Jackson, in a concurring opinion, in *Youngstown v. Sawyer, supra* (p. 633), thought that the seizure would give to the President not only the power to execute the laws under Article 2 of the Constitution, but to make some. Writing of the President's power, he said (p. 646):

> What the power of command may include, I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.

The seizure of petitioners by respondents, not less than the seizure of the steel plants, is protected by due process of law under the Fifth Amendment (*Youngstown v. Sawyer, supra*). The summary violation by respondents of lawful mandates and constitutional restrictions imposed upon them, to the injury of petitioner, constitutes a violation of petitioners' right of due process of law.

The existence of a state of war does not suspend or change the operation of the guarantees and limitations of the Fifth Amendment conferred upon citizens by the Constitution. (*United States v. Cohen Grocery Co.*, 255 U.S. 81.)

The legal power of the respondents to ship petitioners to Vietnam rests upon weaker grounds than the government's seizure of the steel plants in *Youngstown v. Sawyer, supra.* There the government failed to sustain its position even in the light of the Korean conflict, a United Nations action. In Vietnam there has been no such approval by the United Nations. The violation of our treaty obligations is clearly and unequivocally in contravention of our Constitution.

5. United States Action in Vietnam Violates the Laws of Land Warfare and Petitioners' Participation Would Make Them Guilty Under International Law.

The character of the conduct of the United States in Vietnam raises serious questions concerning violations of the laws of land warfare.

The signators to the Geneva Convention of 1949 regulating the treatment of prisoners and the wounded and sick, and the protection of civilians, include virtually all the nations of the world. The United States has also signed and ratified the earlier Hague Conventions dealing with some of the same subjects. The Department of the Army Field Manual, FM 27-10 specifically observes that treaties constitute the "supreme law of the land", their provisions "must be observed by both military and civilian personnel" (the provisions are set forth on p. 5, *supra*).

The Law of Land Warfare, FM 27-10, Chapter 1, Section 1, Paragraph 2, sets forth what are specific acts constituting violations of Laws of War. (The provisions appear on p. 5, *supra*.)

6. Treatment of Prisoners.

The United States' active participation in the war has made it a party to the torture of prisoners and acquiescence by others committed in the presence of United States military personnel. Professor Greenspan in his treatise *The Modern Law of Land Warfare* states the law: "In accordance with the general principles of criminal law regarding complicity, the accomplice is accountable for crimes committed in furtherance of the common purpose, even though he himself did not commit the actual crimes" (469). *The Dachau Concentration Camp Trial* (Trial of Weiss, et al.) (1945) U.S. Gen. Mil. Govmt. Ct., L. R. T. W. C., XI, 12-16 is authority for the proposition that where "a common design to violate the laws and usages of war is established, everybody taking part in the common design is guilty of war crime,

though the nature and extent of the participation may vary" (469).

Under Article 17 of the Geneva Convention on Prisoners, a prisoner of war need only give his name, rank, date of birth and serial number and that "no physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever."

Eyewitness reports include the following instances of torture of Viet Cong prisoners: "bambo slivers run under their fingernails or wires from field telephone connected to arms, nipples, or testicles" (Newsweek correspondent William Touhy, New York Magazine, Nov. 28, 1965); dunking men head first into water tanks or slicing them up with knives" (Chief correspondent, London Sunday Mirror, Donald Wise, April 4, 1965); "the 'ding-a-ling' method of interrogation involves connection of electrodes from this [U.S. field] generator to the temples of the subject * * * in case of women prisoners * * * to the nipples" (Malcolm Browne, Pulitzer Prize winning A.P. reporter in *The New Face of War*); "cutting off the fingers, ears, fingernails or sexual organs * * * One American installation has a Viet Cong ear preserved in alcohol" (Beverly Deepe, Herald Tribune Saigon correspondent, April 25, 1965); "they get a Viet Cong and make him hold out his hands against his cheeks, then they take this wire and run it right through the one hand and right through his cheek and into his mouth. * * * Oh you ought to see how quiet them gooks sit in a helicopter when we got them wrapped up like that", a young U.S. Marine quoted by Jimmy Breslin, New York Herald Tribune correspondent, September 29, 1965.

Article 12 of the Geneva Convention on Prisoners requires a country to guarantee the treatment of prisoners it turns over to others.

Even before the Geneva Convention of 1949, United States war crimes tribunals had rules that torture and killing of prisoners of war is a war crime. *Trial of Yoshio Makizawa*

(1946) U.S. Mil. Commission, Shanghai, L. R. T. W. C. XV, 101; releasing prisoners to the custody of others where they are likely to be killed was held to be a crime in *The Jaluit Atol Case* (Trial of Aeuberger) (1946) Br. Mil. Ct. Germany, *ibid.*, 81.

In the case of *In re Yamishita*, 327 U.S. 1 (1946), the United States Supreme Court held that Yamishita had violated the laws of war by failing to control his troops from committing brutalities against prisoners and civilians.

Article 13 of the Geneva Convention on Prisoners of War states that "measures of reprisal against prisoners of war are prohibited."

The continued bombings of North Vietnam by the United States causing death of civilians and non-military objects are the acts to destroy persons and property protected by the laws of the United States through our treaty obligations. *The Belsen Trial* (Trial of Kramer, et al.) established the rule that "a systematic course of conduct" was sufficient to prove intent.

The Charter of the United Nations makes illegal the threat or use of force contrary to the purpose of the United Nations—however, a non-member nation or a member nation which violates these provisions of the Charter commits a further breach of international law by commencing hostilities without a declaration of war or a conditional ultimatum as required by the foregoing articles of Hague Convention No. 111. Conversely, a state which resorts to war in violation of the Charter will not render its acts of agression or breach of the peace any the less unlawful by formally declaring war.

CONCLUSION

Had the petitioners acted in obedience to the orders to go to war in Vietnam, they would have been guilty of war crimes. It would have been no defense that they acted pursuant to orders of a superior officer.[17]

The action for injunctive relief having been denied by the courts below, these petitioners have been found guilty by courts-martial and sentenced to serve prison terms.

A court of law should determine whether the President through his subordinates, respondents herein, is exceeding his powers as Commander-in-Chief under circumstances where there has been no declaration of war by Congress. The petitioners should be allowed their day in court to prove that the orders given to them to go to Vietnam were illegal orders and they should not have been court-martialed until that issue was decided.

WHEREFORE, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

STANLEY FAULKNER
SELMA W. SAMOLS
Attorneys for Petitioners

Dated: July 20, 1967

---

[17] Law of Land Warfare, U. S. Department of Defense Manual FM 27-10, Chapter 8, Section IV, Paragraph 509(a), *supra*, p. 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the within document upon all parties of record in this proceeding by mailing via first class mail, postage prepaid, a copy to each party. I further certify that I have this day mailed to the United States Attorney for the District of Columbia, the Attorney General of the United States and the Solicitor General of the United States copies of this document.

SELMA W. SAMOLS

Dated: New York, N. Y.
July , 1967

APPENDIX A

Opinion of the District Court for the District of Columbia

July 11, 1966

[2] The propriety of transferring a member of the Armed Forces from one part of the world to another is not only political, but a military question over which courts have no jurisdiction.

Furthermore, this suit is, in reality, a suit against the United States, and the United States has not consented to be sued.

In addition, it is not the function of the judiciary to entertain such litigation which challenges the validity, the wisdom or the propriety of the Commander-in-Chief of our Armed Forces abroad.

The issue presented involves a challenge to the conduct of not only diplomatic but foreign affairs over which the President is exclusively responsible.

The motion is denied, and the case is sua sponte dismissed. Counsel for the Government will prepare the proper order.

(Thereupon, the above proceedings were concluded.)

APPENDIX B

Per Curiam Judgment of the United States Court of Appeals for the District of Columbia Circuit

On consideration of appellees' motion to affirm the judgment of the District Court and it appearing that proceedings in this appeal were ordered held in abeyance and that a similar judgment would be entered in this case upon the entry of a judgment in the case of *Luftig v. McNamara, et al.*, No. 20,129, and it appearing that a judgment in said case was filed on February 6, 1967, it is

ORDERED AND ADJUDGED by this court that the judgment of the District Court appealed from in this cause be and it is hereby affirmed.

Per Curiam.

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Luftig v. McNamara, et al.

Per Curiam: This is an appeal from dismissal of a suit for declaratory judgment and injunctive relief brought by Appellant, a private in the Army of the United States, to enjoin the Secretary of Defense and the Secretary of the Army from sending him to Viet Nam. He claims that American military action in Viet Nam is unconstitutional and illegal and that Appellees have no lawful authority to assign him there.[1] Appellant does not challenge the legality of his induction and does not seek release from military duty.

The complaint is entitled in terms of a suit against individual officials of the United States government; in legal effect it is plainly a suit against the United States acting through these officials.

The District Court *sua sponte* ordered dismissal of the complaint on the ground that the relief sought represented a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States.

The District Court was, of course, eminently correct on both its primary and alternative grounds for dismissal; these propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands.

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude.

---

[1] This is Appellant's second attempt to have a Federal court hold the war illegal. His prior suit was dismissed, Luftig v. Ferguson, No. 44700, N.D.Cal., Feb. 18, 1966.

The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Eminente v. Johnson*, __ U.S. App. D.C. __, 361 F.2d 73, *cert. denied*, 385 U.S. 929 (1966); *Pauling v. McNamara*, 118 U.S. App. D.C. 50, 331 F.2d 796 (1963), *cert. denied*, 377 U.S. 933 (1964); *Pauling v. McElroy*, 107 U.S. App. D.C. 372, 278 F.2d 252, *cert. denied*, 364 U.S. 835 (1960).

Affirmed.

APPENDIX D

Order Extending Time To File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 20th, 1967.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 8th
day of May, 1967.

APPENDIX E

Treaties

1. *Kellogg-Briand Pact* (46 Stat. 2343).

Article 1:

> The High Contracting Parties solemnly declare in the names of the respective peoples that they condemn recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.

2. *The Charter of the United Nations* (59 Stat. 1031).

Chapter 1, Article 2(4):

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the United Nations.

Chapter VII, Article 39:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or shall decide what measures shall be taken * * * to maintain or restore international peace and security.

3. *The Nuremberg Judgment.* International Military Tribunal and the Charter of the Tribunal (59 Stat. 1544).

II. Jurisdiction and general principles

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes; namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(e) Crimes Against Humanity; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts, performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior

shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article II, Sec. 2 of Law No. 10, provided for individual responsibility for the crimes defined in Section 1 as follows:

2. Any person, without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he

a) was a principal or

b) was an accessory to the commission of any such crime or ordered or abetted the same or

c) took a consenting part therein or

d) was connected with plans or enterprises involving its commission or

e) was a member of any organization or group connected with the commission of any such crime or

* * *

Charter of the International Military Tribunal for the Far East, January 19, 1946.

The Charter was approved by the Supreme Commander for the Allied Powers January 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, OPA 500, April 26, 1946. (Treaties and Other International Act Series 1589; Dept. of State Publication 2613; A decade of American Foreign Policy, 1941-1949, Senate Document 123, 81st Cong., 1st Session, p. 961.)

The Charter provides in pertinent part:

II. Jurisdiction and general provisions

Article 5. Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes Against Peace:** Namely, the planning, preparation, initiating or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **Conventional War Crimes:** Namely, violations of the laws or customs of war;

(c) **Crimes Against Humanity:** Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, * * * whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation of execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Affirmation of the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.

On motion of the United States the first session of the General Assembly of the United Nations unanimously adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. [Res. 95 (I), adopted 11 December 1946; The

United States and the United Nations: Report by the President to the Congress for the year 1946, Dept. of State Pub. 2735, pp. 129-130; a Decade of American Foreign Policy, 1941-49, p. 965.]

95 (I). **Affirmation of the Principles of International Law recognizing by the Charter of the Nurnberg Tribunal**

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.

4. *Geneva Convention of 1949.*

Article 12:

Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individuals' responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Article 17:

No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

5. *The Geneva Agreement of 1954.* (Final Declaration)

(6)

The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and shall not in any way be interpreted as constituting a political or territorial boundary. * * *

(7)

The Conference declares that, so far as Vietnam is concerned, the settlement of political problems effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an International Commission. * * *

Declaration of the United States:

> * * * [R]efrain from threat or the use of force to disturb them, in accordance with Article 2(4) of the Charter of the United Nations dealing with the obligations of members to refrain in their international relations from the threat or use of force * * * (Extract from Verbatim Records of Eighth Plenary Session).

6. *The Southeast Asia Collective Defense Treaty* (SEATO)

Preamble and Article 1:

> In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other International Agreement, their obligations under the present Charter shall prevail.

Chapter VIII, Article 53:

> (1) The Security Council shall where appropriate utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against an enemy state, as defined in para. 2 of this Article. (enemy state applies to an enemy of any present Charter member during World War II.)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 401

DENNIS MORA, JAMES A. JOHNSON AND DAVID A. SAMAS, PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE AND STANLEY RESOR, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In June 1966, petitioners, who are privates in the United States Army, received orders from their military superiors to report to the Army Overseas Replacement Station in Oakland, California, preparatory to deployment to Vietnam. Claiming that American participation in the Vietnam conflict is illegal, petitioners brought this action to enjoin the Secre-

tary of Defense and the Secretary of the Army from effecting these orders. The district court dismissed the suit (Pet. App. 24). The court of appeals affirmed (Pet. App. 25), following its affirmance of a similar dismissal in *Luftig* v. *McNamara*, 373 F.2d 664, certiorari denied, June 5, 1967, No. 1326, O.T., 1966. The parties in the instant case had stipulated in the court of appeals that, since the legal issues were the same in both cases, they would be bound by the result in *Luftig* (App., *infra*, pp. 4-5).

In view of the stipulated identity of the two cases, we do not here repeat the considerations against review recited in our Memorandum in Opposition in *Luftig* (No. 1326, O.T., 1966). Suffice it to say that petitioners' belated effort to distinguish their case on the ground that they actually received orders to go to Vietnam while Private Luftig had not (Pet. 8) does not touch the basic reasons for dismissal of their action. This is an unconsented suit against the United States. Since petitioners seek to prevent the Secretary of Defense and the Secretary of the Army from exercising their authority, vested in the Executive by the Constitution, regarding the most effective deployment of members of the armed forces, "the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act'." *Dugan* v. *Rank*, 372 U.S. 609, 620; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 704. Moreover, the basic question presented by petitioners—the legality of the American involvement in Vietnam—is a nonjusticiable political question. Petitioners are asking

judicial intervention in the Executive's conduct of foreign policy. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789:

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

See, also *Baker* v. *Carr*, 369 U.S. 186, 211.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,420

DENNIS MORA, JAMES A. JOHNSON AND DAVID A. SAMAS, APPELLANTS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE AND STANLEY RESOR, SECRETARY OF THE ARMY, APPELLEES

STIPULATION

The parties hereto, by their attorneys, stipulate and agree as follows:

1. This case seeks a declaratory judgment and injunction, directing the appellees to refrain from deploying appellants to Vietnam or the immediate vicinity thereof. This case is similar to *Luftig* v. *McNamara et al.*, No. 20,129 now in this Court. The appellants herein are relying on the same legal issues presented by the Luftig case.

2. Subject to approval of the Court, this case shall be held in abeyance to abide the result of the United

States Court of Appeals for the District of Columbia Circuit's disposition of the Luftig case.

/s/ SELMA W. SAMOLS
SELMA W. SAMOLS
517 11th Street, N.W.
Washington, D.C. 20004

STANLEY FAULKNER
9 East 40th Street
New York, New York 10016
Attorneys for Appellants

/s/ ALAN S. ROSENTHAL
Attorney for Appellees

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 273882 145

SU

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 1 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 401

PVT. E2 DENNIS MORA,
PFC. E2 JAMES A. JOHNSON,
and
PVT. E2 DAVID A. SAMAS,
Petitioners,

v.

ROBERT S. McNAMARA,
as Secretary of Defense,
and
STANLEY RESOR,
as Secretary of the Army of
the United States,
Respondents.

PETITION FOR REHEARING

STANLEY FAULKNER
9 East 40th Street
New York, N. Y. 10016

SELMA W. SAMOLS
517 11th Street, N.W.
Washington, D.C.

Attorneys for Petitioners

Dated: November 27th, 1967

Washington, D. C. - THIEL PRESS - 202 - 393-0625

TABLE OF CONTENTS

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT 2

ISSUES 2

Whether United States Military activity in Vietnam constitutes a "war" without a declaration of Congress 2

Whether United States military activity in Vietnam is in violation of treaty obligations 2

Whether Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88th Congress, 2d Session is an impermissible delegation of the war powers of Congress 2

Whether the United States is violating treaty obligations in its war action in Vietnam 2

TABLE OF CASES

Baker v. Carr, 369 U.S. 186 12

Chew Hong v. U.S., 112 U.S. 536 7

Foster v. Neilson, 27 U.S. 253 10

Johnson v. Browne, 205 U.S. 309 7

Johnson v. Eisentrager, 339 U.S. 763 ..... 11, 12

Larson v. Domestic and Foreign Policy Corp., 337 U.S. 682 12

Miller v. U.S., 367 F.2d 72, cert. denied, 386 U.S. 911, pet. for rehearing pending 3

Ex Parte Milligan, 4 Wall. 2 ..... 7, 8

Nixon v. Herndon, 273 U.S. 536 12

O'Brien v. U.S., 376 F.2d 538, Cert. granted Oct. 9, 1967 No. 232, 233 3

Pigeon River Improvement Co. v. Cox, 291 U.S. 138 7

1 Trial of the Major War Criminals Before the International Tribunal of Nuremberg, 194-198, 204-288 (1947) 4

United States v. Gue Liw, 176 U.S. 459 7

United States v. Lee, 106 U.S. 196 12

United States v. Payne, 264 U.S. 449 7

United States v. Von Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunals 485 4

Whitney v. Robertson, 124 U.S. 190. 7

Wolff & Short v. Selective Service Local Board No. 16, et al., 372 F.2d 817 4

Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 . 8, 12

TREATIES

Kellogg-Briand Pact. 5

Charter of the United Nations. 5

London Pact (Nuremberg) 5

Geneva Agreement of 1954. 5

Southeast Asia Collective Defense Treaty (SEATO) 5

Geneva Conventions, 1949, 26 Brit. Yb. Intl. L. 294,298. 5

STATUTES CITED

Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88th Cong., 2d Session. 2, 6

Sec. 12(b), Universal Military Training and Service Act, 50 U.S.C. App. § 462(b)(3) 3

OTHER AUTHORITIES

6 Corpus Juris 336 4

Von Clausewitz, On War 4

International Law, Vol. II, Department of the Army Pamphlet, 27-161-2, October 1962. 5

The Legal Meaning of War and Relations of War to Reprisals, Grotius Society (1927). 5

The Law of Land Warfare, Department of the Army Field Manual, FM 27-10 July, 1956. ..... 6, 11

Congressional Record, April 30, 1965, May 8, 1965, May 20, 1965. 6

Corwin, The President: Office and Powers. 7

Grotius, On War and Peace 11

Rogers, World Policy and the Constitution 8
Jessup, A Modern Law of Nationals 11
Senate Hearing, Comm. on Foreign Relations, August 16, 1967.....
Falk and Milbank, Vietnam and International Law 9
New York Times 3
Hearings, Sen. Res. 151, Com. on Foreign Relations,
U.S. Senate, 90th Cong. 1st Sess. 9, 10
U.S. Constitution Article IV Sec. 2 10

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

PVT. E2 DENNIS MORA,
PFC. E2 JAMES A. JOHNSON,
and
PVT. E2 DAVID A. SAMAS,
Petitioners,

v.

ROBERT S. McNAMARA,
as Secretary of Defense,
and
STANLEY RESOR,
as Secretary of the Army of
the United States,
Respondents.

PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of November 6, 1967, denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on February 20, 1967, affirming the order of the District Court dismissing the action for injunctive relief and a declaratory judgment, and that the petition for certiorari be granted.

Reasons for Granting Rehearing and Issuing the Writ

Substantial grounds available to the petitioners and not previously presented exist in this case under Rule 58 in that (1) the original petition for certiorari when prepared was done without the benefit of congressional interpretation and intent by Congress of the meaning of the Tonkin Bay Resolution, Public Law 88-408, 78 Stat. 384, 88th Cong. 2d Session; (2) the misleading statements appearing in the Government's memorandum in opposition call for a response, here made for the first time.

Two members of this Court, Mr. Justice William O. Douglas and Mr. Justice Potter Stewart, were of the opinion that the petition for certiorari should have been granted. They reasoned in substance that the issues herein should be heard by this Court and a determination made on their justiciability.[1]

Issues

This case presents issues never determined by this Court:

(a) Whether United States military activity in Vietnam constitutes a "war" without a declaration by Congress;

(b) Whether United States military activity in Vietnam is in violation of treaty obligations;

(c) Whether Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88th Congress, 2d Session is an impermissible delegation of the war powers of Congress.

(d) Whether the United States is violating treaty obligations in its war action in Vietnam.

The hostilities that prevail in Vietnam have never been referred to as anything but a "war". The extent to which the President has involved the American people in military commitments and casualties, foreign and domestic policies, have raised questions of serious constitutional stature that should concern this Court.

---

[1] Appendix A, hereto.

The military commitments are many and only a few of the most obvious ones are set forth in the petition to this Court for a writ of certiorari.[2] That petition can now be amended to show additional military casualties with these figures as of November 4, 1967: killed 14,453; non-combatant deaths 2,100; wounded 90,320; missing 798.

Domestically, strong and effective measures are being adopted to curtail and deprive citizens of constitutionally protected rights of free speech. Prosecutions under hastily drawn legislation for burning draft cards[3]; and non-possession of draft cards are now before this Court for consideration.[4]

As recently as October 26, 1967, the National Director of Selective Service, Lieut. Gen. Lewis B. Hershey, issued a memorandum that would make service in the military a form of punishment for war protesters.[5] In his letter to all Selective Service Boards he urged denial of deferment from the military to those who "violate the military selective service act or the regulations." He further added that "All elements of the Selective Service System are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with

---

[2] Filed with this Court on July 20, 1967, No. 401.

[3] Section 12(b)(3) of Universal Military Training and Service Act, 50 U.S.C. App. § 462(b)(3), August 30, 1965.

[4] Miller v. U.S., 367 F.2d 72 (2d Cir. 1966) pet. for certiorari denied, 386 U.S. 911, pet. for rehearing pending. O'Brien v. U.S., 376 F.2d 538 (1st Cir. 1967) pet. for certiorari granted, Oct. 9, 1967, Nos. 232, 233.

[5] The New York Times, November 9, 1967. Cf President James Madison's Statement when upon his retirement he was honored by the citizens of Washington for his protection of civil liberties during the War of 1812, "Power and national glory, sir, have often been acquired by the sword; but rarely without the sacrifice of civil and political liberty."

sound procedure." This letter was accompanied by a memorandum of the same import. This letter and memorandum are the obvious result of a growing sentiment against an unpopular war because of its illegality and immorality. An earlier act to reclassify registrants for exercising first amendment rights of free speech was held unconstitutional in Wolff & Shortt v. Selective Service Local Board No. 16, et al., 372 F.2d 817.

I.

"War, in the broad sense, is a properly conducted contest of armed public forces, or in a narrower sense, a state of affairs during the continuance of which the parties to the war may legally exercise force against each other. It is not necessary, to constitute war, that both parties shall be acknowledged as independent nations or sovereign states, but war may exist where one of the belligerents claims sovereign rights as against the other." (67 C.J. 336).

Von Clausewitz, *On War* (Jolks trans. 1943, p. 4) terms "hostile contention" as "conflict". In our century it has been extended to instances in which there was an absence of actual hostilities, i.e. absence of resistance.[6]

Justice John C. Young, in *United States v. Von Leeb*, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals* 485 (1950), defined war as "an implementation of a political policy by means of violence."

" 'Police actions,' 'armed reprisals,' 'limited war,' and 'total war' are nonetheless war. They are merely different as-

---

[6] During the war crimes trials following World War II, various German leaders were found guilty of waging aggressive war against Denmark, Luxembourg and Czechoslovakia despite the absence of any resistance by those countries. 1 *Trial of the Major War Criminals Before the International Tribunal at Nuremberg*, 194-98, 204-88 (1947).

pects of a familiar technique in interstate relations which has never ceased to change since states first started using it."[7]

The actions of the United States in Vietnam constitute a war within the concept defined by Sir Arnold McNair:[8] They were, first, a declaration of war by one party; and second, if no declaration, then war would exist if the nation against whom force is applied treats such act of force as an act of war. This definition was quoted with approval by Joyce Gutteridge in 1949 when reporting on the scope of the Geneva Conventions of 1949. However, she was quick to add a realistic modification stating that the Geneva Conventions would also apply to "undeclared wars".[9]

2.

A full and detailed discussion of some of the treaties the United States has entered into renouncing war are set forth in the petition herein for a writ of certiorari. To name them only without repeating their applicable provisions, they are:

Kellogg-Briand Pact (pet. 7, 13, 29)[10]
Charter of United Nations (pet. 13, 29)
London Pact (Nuremberg) (pet. 7, 13, 29, 33)
Geneva Agreement of 1954 and our declaration (pet. 7, 13, 34, 35)
Southeast Asia Collective Defense Treaty (SEATO) (pet. 7, 14, 35)

---

[7] *International Law*, Vol. II, Department of the Army Pamphlet 27-161-2, October 1962, page 5.

[8] *The Legal Meaning of War and Relations of War to Reprisals*, 11 Transact. Grot. Soc'y. 29 at 45 (1927).

[9] *Geneva Conventions of 1949*, 26 Brit. Yb. Int'l. L. 294, 298 (1949).

[10] References marked "pet." are to the petition herein for a writ of certiorari.

The law of land warfare is applicable and treaties become operative even in cases where there has been no formal declaration of war.[11]

3.

The President has indicated that authority for his actions in Vietnam may be inferred or extracted from the Tonkin Bay Joint Resolution of August 6-7, 1964 (H.J. Res. 1145; Public Law 88-408, 78 Stat. 384, 88th Cong., 2d Sess.). This resolution is of dubious constitutionality.[12] It is at least arguable that it represents an effort by Congress to delegate to the President power to declare war, a power which Article 1, Section 8, Clause 11, of the Constitution entrusts solely to Congress.[13]

The Tonkin Bay Resolution is, while broad in language, at most an ultimatum – if that. It

> approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

---

[11] *The Law of Land Warfare*, Department of Army Field Manual, FM 27-10, July 1956, page 8.

[12] Question raised by Mr. Justice Potter Stewart in opinion to grant certiorari in this case, November 6, 1967.

[13] See the remarks of Senator Gruening, Congressional Record, May 8, 1965, pp. 9392 ff.; of Senator Morse, Congressional Record, April 30, 1965, pp. 8797, 8800 ff.; May 20, 1965, p. 10735. It is true, as Senator Morse has stated (Congressional Record, April 30, 1965, p. 8802) that ". . . we have been confronted with a type of legal anomaly such that if Congress and the President really usurp the power to act outside the law in this interesting field of law, we know of no procedure that can get the question to the United States Supreme Court for review and determination. That this is a legal wrong without a judicial remedy makes it no less a legal wrong."

It goes on to express the view that the maintenance of international peace and security in Southeast Asia is "vital" to the national interests of the United States and declares the readiness of the United States to take all necessary steps, including the use of armed forces, to assist any member or protocol SEATO state to defend its freedom. The Resolution, however, provides that all such steps shall be

> Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty. . .

There is a firm line of decisions that subsequent acts of Congress must be construed as to be consistent with the obligations of pre-existing treaties wherever such construction "is possible". (*U.S. v. Payne*, (1924) 264 U.S. 446, 449; *Cook v. U.S.*, (1933) 288 U.S. 102, 120; *Pigeon River Improvement Co. v. Cox*, (1934) 291 U.S. 138, 160; *Whitney v. Robertson*, (1888) 124 U.S. 190, 194). Repudiation or nullification of a prior treaty can only be inferred when "absolutely incompatible". (*Johnson v. Browne*, (1907) 205 U.S. 309, 321); this, because it must be presumed that the United States at all times intends to abide by all of its treaty obligations "with good faith and fairness." (*U.S. v. Payne, supra*, 264 U.S. 446, 448.)

See also: *Chew Hong v. U.S.*, (1884) 112 U.S. 536.
U.S. v. Gue Liw, (1900) 176 U.S. 459, 465.

The Tonkin Bay Resolution by its very terms states that it must be "consonant with . . . the Charter of the United Nations."

Our constitutional system is wisely one of checks and balances. The doctrine of "separation of powers" is fundamental to, and is one of the "great structural principles of the American constitutional system." Corwin, *The President: Office and Powers*, page 9.

This Court said in *Ex parte Milligan*, 4 Wall, 2, 139:

> The power to make the necessary law is in Congress; the power to execute in the President. Both powers imply many subordinate powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.

"Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress." *Youngstown Sheet and Tube Company v. Sawyer,* 343 U.S. 579, 642.

The decision to place the responsibility for declaring war exclusively in Congress was deliberate by the Framers. The history of nations in which this power was vested in the sovereign was not to be repeated in this new government. This power to declare war was of such concern that it was not left to the Senate alone. The Framers therefore provided that the House of Representatives, larger and more representative of the people, should also decide the question.

> The Constitution says, therefore, in effect, "Our country shall not be committed formally to a trial of force with another nation, our people generally summoned to the effect that all the legal consequences to people, rights and property incurred until the House, Senate and the President agree." Rogers, *World Policing and the Constitution,* (Boston, 1945). page 35.

The power of the President is not an unlimited one and in the area of war it is governed by law clearly enunciated in the Constitution and defined by this Court. Mr. Justice Jackson in a concurring opinion in *Youngstown Sheet and Tube Company v. Sawyer, supra,* 655 (1952) recorded what the Framers of our Constitution intended:

> With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the Law, and that the Law be made by parliamentary deliberations.

Mr. Justice Stewart in his opinion on the petition herein for a writ of certiorari points up an important question for this Court to decide. Was the Tonkin Bay Resolution an "impermissible delegation of all or part of Congress' power to declare war"?

The events following the passage of the Tonkin Bay Resolution caused Congress to reconsider what it had done. Had Congress abdicated its sole constitutional power to declare war? Had the President, as Chief Executive, assumed by this Resolution a right exclusively within the domain of the Legislature? Had the United States violated international law making its war conduct in Vietnam illegal? These very important questions of law began to trouble not only the Legislature, but many contemporary authorities on international law.[14]

In the United States Senate, hearings were held before the Committee on Foreign Relations, Senator J. W. Fulbright, Chairman. In the opening statement on August 16, 1967, he said (page 1):[14a]

> I am deeply concerned, however, with the constitutional question to be considered in these hearings. The fact that the war in Vietnam is related to the constitutional problem does not mean that the latter is merely a facade for pressing opposition to the war. It means only that this war, which I oppose so deeply, and events connected with it, such as the adoption of the Gulf of Tonkin resolution in 1964 and other events such as the Dominican intervention of 1965, have aroused in me an awareness of institutional problems that I probably should have had before, but in fact did not.

---

[14] *Vietnam and International Law*, An Analysis of the Legality of the United States Military Involvement. Compiled by the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam. Chairman, Richard A. Falk, Albert G. Milbank, Professor of International Law and Practice, Princeton University (O'Hare, 1967).

[14a] Hearings, Res. 151, Com. on For. Rel. U.S. Senate, 90th Cong. 1st Sess.

> (p. 2) I have another predilection which I wish to make clear at the outset. I believe that a marked constitutional imbalance between the Executive and the Congress in matters of foreign policy has developed in the last 25 years as a result of which the Executive has acquired unrestricted power to commit the United States abroad politically and militarily.

A witness before the Committee was Prof. Ruhl J. Bartlett, Professor of Diplomatic History, Fletcher School of Law and Diplomacy at Tufts University. It was his considered opinion that there is "no constitutional basis for the assumption that substantive powers were conferred on the President as the Executive" and thus the President has no "authority as commander-in-chief to replace the authority of the Congress to declare war or to determine the use of the armed forces, or that he has the authority to define and execute treaties in any way he desires." (page 21)

In commenting upon the President's reliance upon SEATO as justification for sending troops to Vietnam, Professor Bartlett was very critical (page 39):

> The Secretary of State has said that the United States is acting under the authority of the SEATO treaty in Vietnam, but the SEATO treaty under any sharp interpretation does not confer upon the President the power to use the U.S. Army to implement the treaty. This is an exaggeration of the interpretation of the treaty.

4.

Treaties by reason of Article VI, Clause 2, are the supreme law of the land. They have long been held by this Court to be equal to legislative acts. *Foster v. Neilson*, 27 U.S. 253 (1829).

Treaties between nations relating to the law of war have a force equal to that of laws enacted by the Congress. "Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter

and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof." (Law of Land Warfare, Department of the Army Field Manual, 27-10, July, 1956, p. 7).

A member of the armed forces who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment,[15] (ibid., p. 178); nor can he raise as a defense that he acted pursuant to "superior authority." (ibid., p. 182).

Hugo Grotius (1583-1645) wrote a book in 1645 entitled *On War and Peace*. Many ideas in this book acquired a renewed significance at Nuremberg, such as the proposition that individuals are directly obligated by international law.

5.

Mr. Justice William O. Douglas in his decision to grant the petition herein for a writ of certiorari noted with criticism the detachment of sentences from an opinion of the Court that would give the impression "that what is happening is none of our business." Reference was made to respondents' memorandum in opposition to the petition wherein this sentence from *Johnson v. Eisentrager*, 339 U.S. 763, 789 was quoted:

> Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen– which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.
> * * *

---

[15] "But international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as in the traditional law, which is considered to be applicable to states alone and not to individuals". Jessup, *A Modern Law of Nations* 2 (1952).

In this case Germans captured in China were to be tried before a Military Commission. They sought a writ of habeas corpus in the District Court for the District of Columbia. The lower court denied the writ and the Court of Appeals reversed hodling that "(b) In the absence of hostilities, martial law, or American Military occupation of China, and in view of treaties between the United States and China . . . . and between Germany and China . . . the Military Commission was without jurisdiction." This Court reversed the Court of Appeals denying the writ, stating at page 775 that Courts can "ascertain the existence of a state of war."

In *Johnson v. Eisentrager, supra*, the Court was deciding a case upon facts totally different from this case and especially one involving a state of "declared war".

6.

The case now before this Court does not lie beyond judicial cognizance. This point is presented in full in the petition for certiorari and will not be repeated in this petition for a rehearing. The authorities therein cited are:

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579.
Baker v. Carr, 369 U.S. 186
Nixon v. Herndon, 273 U.S. 536
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (citing *United States v. Lee*, 106 U.S. 196)

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

STANLEY FAULKNER
9 East 40th Street
New York, N.Y. 10016

SELMA W. SAMOLS
517 11th Street, N.W.
Washington, D.C.

Attorneys for Petitioners

Dated: November 27th, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

MORA ET AL. *v.* McNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 401. Decided November 6, 1967.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The petitioners were drafted into the United States Army in late 1965, and six months later were ordered to a West Coast replacement station for shipment to Vietnam. They brought this suit to prevent the Secretary of Defense and the Secretary of the Army from carrying out those orders, and requested a declaratory judgment that the present United States military activity in Vietnam is "illegal." The District Court dismissed the suit,[1] and the Court of Appeals affirmed.[2]

There exist in this case questions of great magnitude. Some are akin to those referred to by MR. JUSTICE DOUGLAS in *Mitchell* v. *United States*, 386 U. S. 972. But there are others:

I. Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11 of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

---

[1] — F. Supp. — (D. D. C. 1966).

[2] — U. S. App. D. C. —, — F. 2d —.

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the joint Congressional ("Tonkin Bay") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967,

MORA ET AL. *v.* McNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 401. Decided November 6, 1967.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The questions posed by MR. JUSTICE STEWART cover the wide range of problems which the Senate Committee on Foreign Relations recently explored,[1] in connection with the SEATO Treaty of February 19, 1955,[2] and the Tonkin Gulf Resolution.[3]

Mr. Katzenbach, representing the Administration, testified that he did not regard the Tonkin Gulf Resolution to be "a declaration of war" [4] and that while the Resolution was not "constitutionally necessary," it was "politically, from an international viewpoint and from a domestic viewpoint, extremely important." [5] He added:[6]

> "The use of the phrase 'to declare war' as it was used in the Constitution of the United States had a particular meaning in terms of the events and the practices which existed at the time it was adopted . . . .
>
> "[I]t was recognized by the Founding Fathers that the President might have to take emergency action to protect the security of the United States,

[1] Hearings on S. Res. No. 151, 90th Cong., 1st Sess. (1967).
[2] [1955] 6 U. S. T. 81, T. I. A. S. No. 3170.
[3] 78 Stat. 384.
[4] Hearings, on S. Res. No. 151, *supra*, n. 1, at 145.
[5] *Id.*, at 145.
[6] *Id.*, at 80–81.

but that if there was going to be another use of the armed forces of the United States, that was a decision which Congress should check the Executive on, which Congress should support. It was for that reason that the phrase was inserted in the Constitution.

"Now, over a long period of time, . . . there have been many uses of the military forces of the United States for a variety of purposes without a congressional declaration of war. But it would be fair to say that most of these were relatively minor uses of force . . . .

"A declaration of war would not, I think, correctly reflect the very limited objectives of the United States with respect to Vietnam. It would not correctly reflect our efforts there, what we are trying to do, the reasons why we are there, to use an outmoded phraseology, to declare war."

The view that Congress was intended to play a more active role in the initiation and conduct of war than the above statements might suggest has been espoused by Senator Fulbright (Cong. Rec. Oct. 11, 1967, p. 14683–14690), quoting Thomas Jefferson who said:[7]

> "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."

---

[7] 15 Papers of Jefferson 397 (Boyd ed., Princeton 1955). In the Federalist No. 69, at 465 (Cooke ed. 1961), Hamilton stated:

"The President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature."

These opposed views are reflected in the *Prize Cases*, 2 Black 635, a five-to-four decision rendered in 1863. Mr. Justice Grier, writing for the majority, emphasized the arguments for strong presidential powers. Justice Nelson, writing for the minority of four, read the Constitution more strictly, emphasizing that what is war in actuality may not constitute war in the constitutional sense. During all subsequent periods in our history—through the Spanish-American War, the Boxer Rebellion, two World Wars, Korea, and now Vietnam—the two points of view urged in the *Prize Cases* have continued to be voiced.

A host of problems is raised. Does the President's authority to repel invasions and quiet insurrections, his powers in foreign relations and his duty to execute faithfully the laws of the United States, including its treaties, justify what has been threatened of petitioners? What is the relevancy of the Gulf of Tonkin Resolution and the yearly appropriations in support of the Vietnam effort?

The London Treaty (59 Stat. 1546), the SEATO Treaty (6 U. S. T. 81, 1955), the Kellogg-Briand Pact (46 Stat. 2343), and Article 39 of Chapter VII of the UN Charter deal with various aspects of wars of "aggression."

Do any of them embrace hostilities in Vietnam, or give rights to individuals affected to complain, or in other respects give rise to justiciable controversies?

There are other treaties or declarations that could be cited. Perhaps all of them are wide of the mark. There are sentences in our opinions which, detached from their context, indicate that what is happening is none of our business:

> "Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the

propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson* v. *Eisentrager*, 339 U. S. 763, 789.

We do not, of course, sit as a committee of oversight or supervision. What resolutions the President asks and what the Congress provides are not our concern. With respect to the Federal Government, we sit only to decide actual cases or controversies within judicial cognizance that arise as a result of what the Congress or the President or a judge does or attempts to do to a person or his property.

In *Ex parte Milligan*, 4 Wall. 1, the Court relieved a person of the death penalty imposed by a military tribunal, holding that only a civilian court had power to try him for the offense charged. Speaking of the purpose of the Founders in providing constitutional guarantees, the Court said:

> "They knew . . . the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*." *Id.*, 125.

The fact that the political branches are responsible for the threat to petitioners' liberty is not decisive. As Mr. Justice Holmes said in *Nixon* v. *Herndon*, 273 U. S. 536, 540:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but

it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court."

These petitioners should be told whether their case is beyond judicial cognizance. If it is not, we should then reach the merits of their claims, on which I intimate no views whatsoever.